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654475—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 130

IBRAHIM J. ABDALLAH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 158–163) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered May 18, 1945 (R. 163–164). The petition for a writ of certiorari was filed June 15, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether a physician issuing narcotic prescriptions in bad faith to an addict commits a violation of the Harrison Narcotic Act where there is no collusion between the physician and the pharmacist who fills the prescriptions.

2. Whether the physician is relieved from liability by reason of the fact that the addict, who was a government informer, caused the prescriptions to be filled.

3. Whether the fact that the informer addict falsely told petitioner that he was suffering from a chronic disease in itself established the defense of entrapment where there was evidence that petitioner was not deceived by such claim.

4. Whether the absence of proof that the Government had reasonable grounds of suspicion before employing an informer to investigate petitioner precludes petitioner's conviction on the basis of the informer's testimony, such proof of reasonable grounds having been excluded on petitioner's motion.

5. Whether it was proper to admit evidence of a number of other prescriptions for narcotics issued by petitioner.

STATUTE INVOLVED

Section 2554 of the Internal Revenue Code (26 U. S. C. 2554) provides in part:

> (a) * * * It shall be unlawful for any person to sell, barter, exchange, or give

away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

* * * * *

(c) * * * Nothing contained in this section * * * shall apply—

(1) * * * To the dispensing or distribution of any of the drugs mentioned in section 2550 (a) to a patient by a physician, dentist, or veterinary surgeon registered under section 3221 in the course of his professional practice only. * * *

STATEMENT

An indictment in six counts was returned against petitioner, a physician (R. 92), in the United States District Court for the Eastern District of New York, charging him with unlawful sales of morphine on six different dates (R. 7–11). Petitioner was found guilty on the last three counts (R. 5, 145), and he was sentenced to imprisonment for three and one-half years on each, the sentences to run concurrently (R. 5). On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was affirmed (R. 163).

The evidence for the Government may be summarized as follows:

On March 10, 1943, one Port, a narcotic addict who acted as a government informer, called at

petitioner's office, told petitioner that he was suffering from bronchial asthma, and asked to be examined (R. 14–15, 16). Petitioner examined Port with a stethoscope and stated that he could find nothing wrong, that Port was "only an addict" (R. 15). Petitioner examined Port's arm which bore needle marks and remarked that Port was "shooting it in the vein" (R. 16). At the conclusion of the visit petitioner gave Port a prescription for morphine sulphate and ephedrine sulphate and charged him a fee of $4 (R. 17; see also R. 77). Port called at petitioner's office on five other occasions between March 12 and March 30 and each time petitioner gave him similar prescriptions for morphine sulphate and ephedrine sulphate (R. 20–21, 22–24, 25–26, 28, 30–31, 33–35, 77). During Port's fourth visit on March 20, 1943, petitioner told him that if he had more money he would give him more prescriptions (R. 26–27). Port left and returned in about an hour with $8 for which petitioner gave him two prescriptions (R. 28). On the last two visits Port brought $12 with him and received three prescriptions each time (R. 31, 33, 35). Petitioner told Port not to have the prescriptions filled at one drug store and to tear the labels off the boxes containing the prescribed capsules (R. 21, 28, 34). During Port's last visit, petitioner stated that the next time he would write a prescription in the name of one of Port's friends (R. 35).

Petitioner did not examine Port except at the time of the first visit (R. 37).[1] Port received twelve prescriptions as a result of six visits to petitioner (R. 36; see R. 111–112).

In each instance the money given by Port to petitioner was supplied by a narcotic agent (R. 15, 18, 23, 25, 31, 32, 33, 56, 58, 59, 60, 62). After each visit Port showed the prescription to the agent (R. 18, 22, 25, 26, 30, 56, 58–59, 61–63), and subsequently had the prescriptions filled by a pharmacist (R. 36, 45) with money supplied by the agent (R. 72). In accordance with a prior arrangement between Port and the pharmacist, Port was supplied with straight morphine sulphate in the amount called for by the prescription instead of morphine and ephedrine (R. 46–47, 73).

Port was examined at the United States Marine Hospital about a year before and a year after his visits to petitioner, and on neither occasion was there any evidence of bronchial asthma (R. 81–83), a chronic disease with objective symptoms (R. 84, 96). In medical opinion, morphine sulphate is not a specific remedy for asthma and should not be used in the treatment of that ailment except in extreme cases where a patient suffers from lack of sleep (R. 84–85; see R. 119–120).

[1] The agent who observed Port enter and leave petitioner's office testified that on most of these occasions Port was in the office with petitioner less than five minutes (R. 58–62).

ARGUMENT

1. Petitioner's contention that the issuance of a prescription by a physician, even if in bad faith, cannot constitute the offense of unlawfully selling narcotics unless there is some prearrangement between the physician and the pharmacist who fills the prescription (Pet. 5, 6, 19–21), is without support in the decisions. In *United States* v. *Behrman,* 258 U. S. 280, this Court sustained the validity of an indictment which charged a physician with the unlawful sale of narcotics by issuing prescriptions for an excessive amount of the drug to a known addict with the intent that the addict would thereby obtain the drugs from a pharmacist, thus holding, at least by implication, that it was unnecessary to allege collusion between the physician and pharmacist. Numerous decisions of various circuit courts of appeals have either specifically held or have assumed that a physician issuing a prescription for narcotics in bad faith is liable under the statute, irrespective of the guilt or innocence of the pharmacist who fills the prescription. *Nigro* v. *United States,* 117 F. 2d 624, 631 (C. C. A. 8); *Manning* v. *United States,* 31 F. 2d 911, 913 (C. C. A. 8); *Nelms* v. *United States,* 22 F. 2d 79, 81 (C. C. A. 9); *Freeman* v. *United States,* 86 F. 2d 243, 244 (C. C. A. 5), certiorari denied, 299 U. S. 616; *United States* v. *Lindenfeld,* 142 F. 2d 829, 831 (C. C. A. 2), certiorari denied, 323 U. S. 761. It is true that in

the case of *Jin Fuey Moy* v. *United States,* 254 U. S. 189, cited by petitioner (Pet. 20), this Court held the physician liable on the theory that he was an aider and abettor, or an accessory before the fact (Sec. 332 of the Criminal Code; 18 U. S. C. 550), but it should be noted that the evidence in that case established collusion between the physician and the pharmacist, and it was therefore unnecessary for the Court to consider the liability of a physician who causes the sale through the instrumentality of a pharmacist with whom he has no prearrangement. *Morei* v. *United States,* 127 F. 2d 827 (C. C. A. 6), upon which petitioner also relies (Pet. 20), is distinguishable in that there the physician merely gave the informer the name of the man from whom heroin might be purchased to dope race horses, but did not actively participate in bringing about the sale in the same way as does a physician who issues a prescription calling for the delivery of narcotics by a pharmacist.

2. Petitioner also contends (Pet. 4, 5, 9–14) that since the offense was not complete until the prescription was filled, and since the prescriptions were filled as the result of a prearrangement between the government informer and the druggist, petitioner was not guilty of the offense condemned by the statute, the informer's acts not being imputable to him. The cases upon which he relies (Pet. 11) turn on the theory of

entrapment, i. e., that a defendant should not be held liable where the decoy performs the crucial act constituting the crime. Here, however, as the court below pointed out (R. 161), the crucial act was the issuance of the prescription, and petitioner alone performed that act. The filling of the prescription was merely the natural consequence of petitioner's guilty act, a consequence anticipated by petitioner. Since, as we have shown (*supra,* pp. 6–7), the lawfulness or unlawfulness of the means by which the prescription was filled is not relevant in determining petitioner's guilt, it is unnecessary to impute the informer's act to him in order to sustain his conviction.[2] The defense of entrapment is not available where government agents merely allow "the crime already conceived to be carried out sufficiently to obtain evidence necessary for a conviction of the crime." *Farber* v. *United States,* 114 F. 2d 5, 10 (C. C. A. 9), certiorari denied, 311 U. S. 706.[3]

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[2] There was evidence (*supra*, p. 5) that the pharmacist did not fill the prescriptions in strict accordance with their terms but gave petitioner straight morphine sulphate in the amounts called for by the prescriptions. This separate arrangement was, of course, not imputable to petitioner, but, as the court below said (R. 160), the crime is the sale of morphine by means of the illegal prescription, and it is immaterial that, in using the prescription for such purpose, the pharmacist may have failed to include ingredients other than morphine which were prescribed.

[3] Petitioner's contention (Pet. 5, 13) that his conviction on the sixth count is invalid because the prescription was filled

3. Petitioner argues (Pet. 5, 14–16) that the informer's false statement during his first visit that he suffered from chronic asthma in itself established the defense of entrapment. However, the informer testified that at the first visit, petitioner was aware that he was an addict and, moreover, there was expert testimony that morphine sulphate is not, ordinarily, a proper treatment for asthma. It thus clearly appears that the informer's statement was not the cause of petitioner's unlawful acts. Furthermore, the jury convicted petitioner only on the last three counts, based upon later visits at which petitioner gave the informer several prescriptions at one time, a fact clearly tending to establish bad faith on petitioner's part. At most, the issue of entrapment was a question of fact (*Sorrells* v. *United States,* 287 U. S. 435), which the jury, under proper instructions (R. 140–142), has resolved against petitioner.

4. There is no merit in petitioner's further contention (Pet. 5, 16–17) that his defense of entrapment must be sustained because there was no proof that the Government had reasonable grounds to believe that he was engaged in illegal traffic in narcotics before it utilized an informer. However, the Government attempted to introduce evidence of such reasonable cause but it was ex-

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after his arrest, is immaterial, since he received concurrent sentences on the three counts on which he was convicted. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105.

cluded on objection by petitioner's counsel (R. 55, 79). Moreover, as the court below pointed out (R. 161–162, fn. 1), the existence of reasonable grounds for suspicion is not an absolute prerequisite to the use of decoys and the Government is not required to introduce such evidence as a condition precedent to the informer's testimony. Such testimony is merely relevant to the question whether the person accused was without criminal intent before being approached by the informer (see *Swallum* v. *United States*, 39 F. 2d 390, 393, (C. C. A. 8)). The absence of evidence of reasonable cause therefore operated in petitioner's favor since such evidence would have tended additionally to overcome his defense of entrapment.

5. The Government introduced in evidence 115 prescriptions for narcotics issued by petitioner which were found in drugstores in the immediate neighborhood of his office (R. 68–71, 91). When petitioner took the stand in his own behalf, he was cross-examined as to 50 of these prescriptions, calling for morphine and ephedrine sulphate, issued over a period of seven months to one De Rosa, who petitioner asserted was suffering from chronic bronchitis (R. 113–116). Petitioner attacks the admission of such evidence and his cross-examination in respect thereof (Pet. 6, 17–19) on the ground that the Government failed to show that these prescriptions were unlawfully issued. However, the fact that petitioner issued such a large number of narcotic prescriptions,

and in particular the fact that so many were issued to De Rosa in a comparatively short space of time, was a sufficiently suspicious circumstance to make this evidence relevant to the issue of petitioner's criminal intent. *Weaver* v. *United States,* 111 F. 2d 603, 606 (C. C. A. 8); *Freeman* v. *United States,* 86 F. 2d 243, 244 (C. C. A. 5), certiorari denied, 299 U. S. 616; *Harris* v. *United States,* 273 Fed. 785, 791 (C. C. A. 2), certiorari denied, 257 U. S. 646; *Dysart* v. *United States,* 270 Fed. 77, 79 (C. C. A. 5), certiorari denied, 256 U. S. 694.

CONCLUSION

The decision below is correct and there is involved no real conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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